Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–225 OF 1999
ZULKEFLI, SURIYADI AND HELILIAH JJCA
25 JANUARY 2008

Civil Procedure — Consent order — Variation — Application to vary maintenance order — Proper mode and procedure — Divorce and Matrimonial Proceedings Rules 1980

Family Law — Divorce — Ancillary relief — Variation of consent order — Proper mode and procedure — Whether by way of summons in chambers — Divorce and Matrimonial Proceedings Rules 1980

Family Law — Divorce — Maintenance — Variation of maintenance order — Application made under separate divorce petition — Application made seven years after initial maintenance allegedly found insufficient — Whether permissible — Whether application mala fide and vexatious

On 17 December 1987, the petitioner filed Divorce Petition No KG 61 of 1987 praying for, inter alia, judicial separation, division of property and a monthly maintenance of RM1,500. A consent order was made on 14 June 1989 for, inter alia, a monthly maintenance of RM1,500. On 25 January 1991, the petitioner filed Divorce Petition No KG 9 of 1991 for, inter alia, divorce, monthly maintenance of RM2,000 and property division. The petitioner also filed an application for ancillary relief. The respondents objected to the application on the basis that the reliefs sought had already been granted and/or determined in Divorce Petition No KG 61 of 1987. The deputy registrar overruled the objection but on appeal to the judge in chambers, the respondents' appeal was allowed and the petitioner's application struck out with costs. However on 2 November 1998, the petitioner filed in Divorce Petition No KG 9 of 1991, an application under s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') to vary the consent order made on 14 June 1989. The application was made by way of summons in chambers. At the hearing of the application, the respondents raised preliminary objections, contending that the petitioner's application ought to be struck out as it had already been determined, was made through the wrong mode and in the wrong proceedings. The High Court however

A overruled the objections and held that the application was procedurally correct and proper. The High Court also varied the order of maintenance by raising it to RM3,000 per month. The first respondent appealed.

B **Held**, allowing the appeal with costs:

(1) The High Court erred in law in holding that the petitioner's application by way of summons in chambers dated 2 November 1998 was procedurally correct and proper. Such a mode contravened the C provisions of the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules'). The High Court judge ought to have held that the application should be made by way of a Form 11 notice and not by way of summons in chambers (see paras 6–7).

D (2) The High Court had also erred in fact and in law in holding that there was no evidence to show that the application was mala fide and vexatious. The application for variation was made on 2 November 1998 wherein the petitioner claimed for the maintenance order to be raised to RM3,000 with effect from January 1991 on the ground that the E monthly maintenance of RM1,500 was insufficient for both her daughter and herself since January 1991. However, the fact that the petitioner only applied for a variation order seven years after the alleged need for a maintenance of RM3,000 per month first arose, was clear evidence that the petitioner was not in real need of a monthly F maintenance of RM3,000 per month since January 1991. Furthermore, the affidavit in support of the petitioner's application mentioned nothing about the costs of living and the petitioner's needs in 1991 (see para 8).

G (3) In light of the contradictory allegations contained in the affidavits of the first respondent and the petitioner, the respondents could not be said to have agreed with the petitioner in respect of the amount claimed by her. Thus, the High Court judge had erred in holding that the respondents were agreeable to the amount of RM3,000 per month (see paras 9–10).

H (4) The High Court judge further erred in failing to consider the non-compliance by the petitioner of rr 63, 65 and 66 of the 1980 Rules (see para 11).

(5) In the instant case, the petitioner had filed the summons in chambers under the wrong petition. The petitioner sought to vary the order dated I 14 June 1989. There was no such order in the instant Divorce Petition No KG 9 of 1991. The High Court judge had therefore erred in finding that it did not matter which High Court the application was filed in. He should have noted that the application was filed under Divorce Petition No KG 9 of 1991 to vary the order made in Divorce Petition

No KG 61 of 1987. It was not just a matter of one court hearing the action of another court. It was a matter of varying of an order made in a separate proceeding (see para 13).

[Bahasa Malaysia summary

Pada 17 Disember 1987, pempetisyen telah memfailkan Petisyen Perceraian No KG 61 Tahun 1987 memohon, antara lain, perpisahan kehakiman, pembahagian hartanah dan nafkah bulanan sebanyak RM1,500. Satu perintah persetujuan telah dibuat pada 14 Jun 1989 untuk, antara lain, nafkah bulanan sebanyak RM1,500. Pada 25 Januari 1991, pempetisyen telah memfailkan Petisyen Perceraian No KG 9 Tahun 1991 untuk, antara lain, perceraian, nafkah bulanan sebanyak RM2,000 dan pembahagian hartanah. Pempetisyen juga memfailkan satu permohonan untuk relief sampingan. Responden-responden telah membantah terhadap permohonan itu atas dasar bahawa relief-relief yang dipohon telahpun diberikan dan/atau ditentukan dalam Petisyen Perceraian No KG 61 Tahun 1987. Timbalan pendaftar telah menolak bantahan itu tetapi semasa rayuan kepada hakim dalam kamar, rayuan responden-responden telah dibenarkan dan permohonan pempetisyen dibatalkan dengan kos. Namun pada 2 November 1998, pempetisyen telah memfailkan dalam Petisyen Perceraian No KG 9 Tahun 1991, satu permohonan di bawah s 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') untuk mengubah perintah persetujuan yang dibuat pada 14 Jun 1989. Permohonan tersebut dibuat melalui saman dalam kamar. Semasa perbicaraan permohonan tersebut, responden-responden telah menimbulkan bantahan-bantahan awal, dengan menegaskan bahawa permohonan pempetisyen patut dibatalkan kerana ia telahpun diputuskan, dibuat melalui cara salah dan dalam prosiding salah. Mahkamah Tinggi bagaimanapun menolak bantahan-bantahan tersebut dan memutuskan bahawa permohonan tersebut secara prosedurnya adalah betul dan teratur. Mahkamah Tinggi juga mengubah perintah nafkah dengan menambahnya kepada RM3,000 sebulan. Responden pertama telah merayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah Tinggi terkhilaf dari segi undang-undang dalam memutuskan bahawa permohonan pempetisyen melalui saman dalam kamar bertarikh 2 November 1998 adalah secara prosedurnya betul dan teratur. Cara sedemikian bertentangan dengan Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 ('Kaedah-Kaedah 1980 tersebut'). Hakim Mahkamah Tinggi sepatutnya memutuskan bahawa permohonan tersebut dibuat melalui satu notis Borang 11 dan bukan melalui saman dalam kamar (lihat perenggan 6–7).

(2) Mahkamah Tinggi juga terkhilaf dari segi fakta dan undang-undang dalam memutuskan bahawa tiada keterangan untuk menunjukkan bahawa permohonan tersebut berniat jahat dan menyusahkan. Permohonan untuk perubahan dibuat pada 2 November 1998 di mana pempetisyen memohon supaya perintah nafkah ditambah kepada RM3,000 berkuatkuasa dari Januari 1991 atas alasan bahawa nafkah bulanan RM1,500 tidak mencukupi untuk kedua-dua anak perempuan dan dirinya sejak Januari 1991. Namun, hakikat bahawa pempetisyen hanya memohon untuk perintah perubahan tujuh tahun selepas keperluan untuk nafkah RM3,000 sebulan dikatakan timbul buat kali pertamanya, adalah keterangan jelas bahawa pempetisyen tidak begitu memerlukan nafkah bulanan RM3,000 sebulan sejak Januari 1991. Selanjutnya, afidavit sokongan permohonan pempetisyen tidak menyatakan apa-apa tentang kos kehidupan dan keperluan pempetisyen dalam tahun 1991 (lihat perenggan 8).

(3) Berdasarkan pengataan bercanggah yang terkandung dalam afidavit-afidavit responden pertama dan pempetisyen, responden-responden tidak boleh dikatakan telah bersetuju dengan pempetisyen berkaitan jumlah yang dituntut olehnya. Oleh itu hakim Mahkamah Tinggi telah terkhilaf dalam memutuskan bahawa responden-responden telah bersetuju terhadap jumlah RM3,000 sebulan yang dituntut oleh pempetisyen dalam permohonan itu (lihat perenggan 9–10).

(4) Hakim Mahkamah Tinggi seterusnya terkhilaf kerana gagal mempertimbangkan ketidakpatuhan pempetisyen terhadap kk 63, 65 dan 66 Kaedah-Kaedah 1980 tersebut (lihat perenggan 11).

(5) Dalam kes ini, pempetisyen telah memfailkan saman dalam kamar di bawah petisyen yang salah. Pempetisyen telah memohon untuk mengubah perintah bertarikh 14 Jun 1989. Tiada perintah sedemikian dalam Petisyen Perceraian No KG 9 Tahun 1991. Hakim Mahkamah Tinggi oleh itu terkhilaf dalam penemuan bahawa ia tidak kira di Mahkamah Tinggi mana permohonan tersebut difailkan. Beliau sepatutnya mengambil perhatian bahawa permohonan tersebut difailkan di bawah Petisyen Perceraian No KG 9 Tahun 1991 untuk mengubah perintah yang dibuat dalam Petisyen Perceraian No KG 61 Tahun 1987. Ia bukan sahaja suatu perkara di mana satu mahkamah mendengar tindakan mahkamah lain. Ia merupakan suatu perkara di mana perubahan perintah dibuat dalam prosiding yang berasingan (lihat perenggan 13).]

Notes

For cases on ancillary relief, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3102–3104.

For cases on maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3255–3271.
For cases on variation, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1707–1715.

Legislation referred to
Divorce and Matrimonial Proceedings Rules 1980 rr 2(1), 56(1), 56(3), 63, 63(1), 65, 66, 91(1)(b), Form 11
Law Reform (Marriage and Divorce) Act 1976 s 83

Appeal from: Divorce Petition No KG 9 of 1991 (High Court, Kuching)

Alvin Yong (Chong Brothers) for the appellant.
Ernest Chua (Ernest Chua & Co) for the respondent.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the first respondent against the decision of the learned judge of the High Court at Kuching in allowing the petitioner's application ('the application') filed by way of summon in chambers under s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') for a variation of the maintenance order made on 14 June 1989. In support of the application, the affidavit affirmed on 2 November 1998 by the petitioner stated that there had been material changes in the circumstances affecting the child of the marriage, namely Emily Jasmine Ngu Beixe, and the life of the petitioner over the past ten years. Emily was then fifteen years old and her needs have increased, and given the high cost of living today, the petitioner had requested that the maintenance be doubled from RM1,500 per month to RM3,000 per month.

BACKGROUND FACTS

[2] The relevant background facts of the case leading to the filing of the application are as follows:

(1) On 17 December 1987, the petitioner filed a Divorce Petition No KG 61 of 1987 in the High Court (I) at Kuching, praying for, inter alia, judicial separation, division of property and a monthly maintenance of RM1,500. A consent order was made on 14 June 1989 including a monthly maintenance of RM1,500.

(2) On 25 January 1991, the petitioner filed the present Divorce Petition No KG 9 of 1991 in the High Court (II) at Kuching, praying for

divorce and among other things, ancillary relief of a month maintenance of RM2,000 and property division. The petitioner at the same time filed a notice of application for ancillary relief. The respondents objected to the application on the primary ground that the issues on property division, custody of the child and maintenance had already been settled in the Divorce Petition No KG 61 of 1987. The Deputy Registrar overruled the objection.

(3) On appeal to the judge in chambers, the learned judge of the High Court allowed the respondents' appeal and ordered that the petitioner's application be strike out with cost.

(4) The petitioner subsequently filed the application by way of a summons in chambers on 2 November 1998 to vary the terms of the consent order in Divorce Petition No KG 61 of 1987 made on 14 June 1989 respecting maintenance.

PRELIMINARY OBJECTION

[3] At the outset of the hearing of the application before the learned judge of the High Court, the respondents had raised preliminary objections on the following grounds:

(1) the application is made in the wrong proceedings;

(2) the application is made by way of a wrong mode;

(3) the application for ancillary relief in the main action had been struck out by this honourable court; and/or

(4) the application is mala fide and vexatious.

FINDING OF THE HIGH COURT

[4] Having heard the arguments of both parties the learned judge of the High Court overruled the preliminary objections by the respondents with costs. The learned judge, inter alia, held that the petitioner's application by way of summons in chambers dated 2 November 1998 is procedurally correct and proper. The learned judge went on to state that as the respondents did not dispute the amount asked for by the petitioner, he held that the respondents were agreeable to the amount. The learned judge then made the order of maintenance which was raised to RM3,000 per month, effective from the date of the application.

DECISION ON APPEAL

[5] We heard the appeal by the first respondent on 8 May 2007 and we unanimously allowed the appeal. We now give the reasons for our decision as follows.

[6] We are of the view the learned judge of the High Court erred in law in holding that the petitioner's application by way of summons in chambers dated 2 November 1998 is procedurally correct and proper when in fact it contravenes the provisions of the rules set out in the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') read in conjunction with the provision of the Act. Rule 2(1) of the 1980 Rules defines 'ancillary relief' to mean, inter alia, a variation order which includes an order for maintenance under s 83 of the Act. Rules 56(1) and (3) of the 1980 Rules provide that an application for a variation order, being not an application for ancillary relief which is required to be made in the petition or answer, shall be made by notice in Form 11 as set out in the Schedule to the 1980 Rules. Rule 91(1)(b) of the 1980 Rules provides that *except* where otherwise provided by the 1980 Rules, every application in a matrimonial proceeding shall be made by summons.

[7] It is our judgment that as r 56(1) and (3) of the 1980 Rules specifically provide for the mode of application for a variation order, such application thus falls under the exception of r 91(1)(b) of the 1980 Rules. In the premises, the learned judge of the High Court therefore erred in law in holding that r 91(1)(b) of the 1980 Rules applies to every application in matrimonial proceedings including the said application. In our view the learned judge ought to have held that the application should be made by way of Form 11 notice and not by way of summons in chambers.

[8] We are also of the view the learned judge of the High Court erred in fact and in law in holding that there is no evidence to show that the application is mala fide and vexatious. We noted that the application was made on 2 November 1998 and in the application the petitioner claimed for a variation order with effect from January 1991 on the ground that a monthly maintenance of RM1,500 was insufficient for both her daughter and herself since January 1991, some seven years ago. There is no time frame within which the petitioner has to bring an application for a variation order. However, the fact that the petitioner only applied for a variation order seven years after the alleged need for a maintenance of RM3,000 per month first arose is clear evidence that the petitioner was not in real need of a monthly maintenance of RM3,000 per month since January 1991. Otherwise, the petitioner would not have waited seven years to make the application. Furthermore, despite the said application being an application for increment of monthly maintenance from RM1,500 to RM3,000 with effect from January 1991, the affidavit in support of the said application mentioned nothing about the costs of living and the petitioner's needs in 1991.

[9] It is our considered view the learned judge of the High Court erred in fact in holding that the respondents are agreeable to the amount of RM3,000

per month claimed by the petitioner in the application, taking into account the affidavit in opposition affirmed by the first respondent on 25 November 1998 challenging the need to increase the amount from RM1,500 to RM3,000. In the first respondent's affidavit affirmed on 25 November 1998, the first respondent denied that costs of living has increased so much that the monthly maintenance of RM1,500 need to be increased to RM3,000. In the first respondent's affidavit, he mentioned that the petitioner was gainfully employed. Although the petitioner denied the allegation, she did mention that she earned some fees from freelance writing.

[10] We take the view that in the light of the contradictory allegations contained in the affidavits of the first respondent and those of the petitioner, the respondent cannot be said to have agreed with the petitioner in respect of the amount claimed by the petitioner in the application. In fact, there are before the court two contentious issues for an investigation to be carried out, that is the needs of the petitioner and the petitioner's income.

[11] We are also of the view the learned judge of the High Court has also erred in law in failing to consider the non-compliance by the petitioner of rr 63, 65 and 66 of the 1980 Rules. Rule 63(1) of the 1980 Rules provides that any application for a variation order shall be supported by an affidavit of the applicant setting out the full particulars of the applicant's property and income. Rule 65 of the 1980 Rules provides that the registrar shall then fix a date of hearing of the application for variation order and that during the hearing the registrar shall investigate the allegations contained in the pleadings, take evidence and order the attendance of witnesses and production of documents. Rule 66 of the 1980 Rules provides that after the completion of the investigation referred to in r 65, the registrar shall make such order as he thinks just, or he may refer the matter to a judge for his decision. The learned judge therefore erred in law in failing to order an investigation as set out in r 65 of the 1980 Rules.

[12] We further find that the learned judge of the High Court erred in law in deciding the merits of the application when the issue before him in its entirety was merely the preliminary objection raised by counsel for the respondents. It is clear from the notes of proceedings and the judgment dated 20 February 1999 that the issue argued before the learned judge is merely the preliminary objection on the said application. From the records in the notes of proceedings, it would show the entire argument before the learned judge was premised on the erroneous procedures adopted by the petitioner. The respondents' counsel was not shown to have been allowed to address the court on the merits of the case after the learned judge had made his ruling on the preliminary objection.

[13] We also noted in addition to the incorrect procedure adopted by the petitioner herein, the petitioner had in actual fact filed the summons in chambers under the wrong petition. The petitioner seeks to vary an order dated 14 June 1989. An examination of the order dated 14 June 1989 will reveal that the said order was made under Divorce Petition No KG 61 of 1987. There is no order dated 14 June 1989 in this present Divorce Petition. In fact this petition was only filed in 1991. The learned judge erred in when he found that 'it does not matter in which High Court this application is filed' when in actual fact he should have noted that this application was filed under Divorce Petition No KG 9 of 1991 to vary an order in Divorce Petition No KG 61 of 1987. It is not just a matter of one court hearing the action of another court. It is a matter of the varying of an order made in a separate proceeding.

CONCLUSION

[14] For the reasons above stated, the appeal is allowed with costs here and in the court below. The order of maintenance made by the learned judge of the High Court is hereby set aside. The deposit paid is to be refunded to the first respondent.

Appeal allowed with costs.

Reported by Andrew Christopher Simon